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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1003 86

REGAL KNITWEAR CO., INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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REGAL KNITWEAR CO., INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Regal Knitwear Co., Inc., your petitioner, respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered March 3, 1944 (140 Fed. (2nd) 746), which decreed enforcement of an order of the National Labor Relations Board against your petitioner, in a proceeding pursuant to Section 10 of the National Labor Relations Act (49 Stat. 452).

Summary Statement of Matters Involved.

After the filing of a Seventh Amended Charge (R. 205-6), this proceeding was instituted by the issuance of a Complaint (R. 207-210) which alleged violations of Sections 8 (1) and 8 (3) of the Act, as follows:

> 1. That petitioner discharged one Jean Strackman for union membership or activities (fol. 624);
>
> 2. That petitioner assigned one Arthur Klein to more arduous or less agreeable work, and subsequently discharged him, for like reason (fol. 624);
>
> 3. That petitioner vilified, disparaged and expressed disapproval of the Union; interrogated its employees concerning their Union affiliations; and urged, persuaded, threatened and warned its employees to refrain from assisting, becoming members of or remaining members of the Union (fol. 625).

The Trial Examiner sustained all three charges (R. 231).

Petitioner duly filed written exceptions to the Examiner's Intermediate Report, wherein (R. 240) it excepted to the Report as a whole upon four separate grounds (R. 240-1), and also as to twenty-six specific matters (R. 241-9).

The Board's combined "Decision and Order" (R. 252-7), enforcement of which was decreed by the Circuit Court, in part affirmed and in part reversed the Examiner.

The Board reversed the Examiner as to the following matters:

> 1. The Board held that "the record does not sustain the allegation that Klein's transfer and discharge were due to his union membership and activities" (fols. 759-760) and dismissed the complaint insofar as it alleged that petitioner discriminated against Arthur Klein (fol. 769).
>
> 2. The Board found that the giving of winter vacations with pay to some employees (including Jean Strackman), with free use of an automobile, did not constitute interference, restraint or coercion. The

Board's decision specifically states: "We do not believe that the record as a whole clearly establishes any improper purpose on the part of the respondent in giving these winter vacations" (fol. 761).

3. The Board found that "the record does not support the allegation that the respondent's distribution of theatre tickets constituted interference with its employees' union activities, and the Trial Examiner's finding to the contrary is hereby reversed" (fols. 762-3).

The Board's decision and order (R. 252-7) makes no findings of fact or conclusions of law in affirmance of the Intermediate Report, but merely states generally that the Intermediate Report, exceptions, brief, and record have been considred and that the findings, conclusions and recommendations of the Examiner, except as noted, are adopted by the Board.

The Board's order (R. 255-7) directs that petitioner herein, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Discouraging membership in Wholesale and Warehouse Workers Union, Local 65, CIO (hereinafter referred to as Local 65), or in any other labor organization of its employees, by discharging or refusing to reinstate employees or in any manner discriminating in regard to hire and tenure of employment or any term or condition of employment;

b. "In any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action:

a. Offer reinstatement to Jean Strackman;

b. Make said Jean Strackman whole for any loss of pay suffered because of petitioner's alleged discrimination against her;

c. Post and maintain for sixty days notices to its employees stating:

(1) That petitioner will not engage in the conduct specified in paragraphs 1a and b;

(2) That petitioner will take the affirmative action specified in paragraphs 2a and b;

(3) That petitioner's employees are free to become and remain members of said Local 65, and that petitioner will not discriminate against any employee because of membership or activity on behalf of that organization;

d. Notify the Regional Director in writing within ten days what steps petitioner has taken to comply with the order.

The order further directs the dismissal of the complaint insofar as it alleges that petitioner discriminated against Arthur Klein.

Further details as to the matters involved herein appear below under the heading "Reasons Relied on for the Allowance of the Writ."

The Questions Presented.

Petitioner seeks the review by this Court of the following questions raised below:

1. Whether, because of the fact that in *In Re Ford Motor Co.*, 31 N. L. R. B. 994, 1099-1100, the Board stated certain reason why in its opinion an offer of reinstatement is an appropriate remedy in all cases, and that the decisive considerations as to reinstatement do not vary from case to case, the Board is relieved from the obligation of examining the facts in each case to determine what, if any, reasons exist, upon those facts, for directing reinstatement, and from its obligation to give in each case a clear indication

that it has actually exercised its discretion, and the basis for such exercise. (*Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177.)

2. Whether the Board may or should require an employer to name, in a posted notice relating to the employer's policies and its employees' rights to engage in union activities, a union which is not shown and not claimed to represent any substantial number or proportion of the employees.

3. (a) Whether the requirement of Section 10(c) of the National Labor Relations Act that the Board shall state its findings of fact, is satisfied by a discursive statement of the evidence, pro and con, in narrative form; and (b) whether, where both the Board and its Trial Examiner stated that their decisions are based upon said discursive narrative statement of the evidence and upon "the entire record", and the Board reverses certain important findings of the Trial Examiner and dismisses certain charges based thereon, without making its own findings, or stating specifically which findings of the Examiner remain in the case and are adopted by the Board, the record discloses the basis of the Board's order with sufficient certainty to be entitled to enforcement by the Court.

4. Whether the Circuit Court of Appeals for the Second Circuit, while recognizing, in *National Labor Relations Board* v. *Standard Oil Co.*, 13 Fed. (2nd) 885, 888, that its decision in *National Labor Relations Board* v. *Air Associates*, 121 Fed. (2nd) 586, 592, is in conflict with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, is nevertheless correct in following its rulings in said *Air Associates* and *Standard Oil Co.* cases, and in declining to follow the ruling of this Court in the *Express Publishing Co.* case.

5. Whether the Board may direct that an employer shall cease and desist from discouraging membership in labor

organizations by refusing to reinstate employees, or by in any manner discriminating in regard to their hire or in regard to the terms or conditions of employment, where there is only a finding of discrimination in the tenure of employment of one employee, and no finding of discrimination in regard to hire or in regard to terms or conditions of employment, or by refusal of reinstatement to any employee, and where there is no substantial evidence of anti-union bias or any finding that the employer is likely to discriminate in regard to hire, terms or conditions of employment, or by refusal of reinstatement.

6. Whether, in the entire absence of any special circumstances, such as appear in *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, the Board may properly direct its order against the employer's successors and assigns, as well as against the employer itself.

7. (a) Whether, as a matter of law, testimony can be so confused, and its essential allegations so destroyed by direct self-contradiction, that it cannot constitute substantial evidence sufficient to support a finding; and (b) whether the testimony of Strackman in this case was so confused and destroyed by self-contradictions that the Board had no right to base a finding and order upon it.

Reasons Relied On for the Allowance of the Writ.

The following reasons are relied on for the allowance of the writ:

1. *As to the effect to be given to the decision of this Court in Phelps Dodge Corporation* v. *National Labor Relations Board, 313 U. S. 177:*

The Board did not state its reasons for holding the reinstatement of Strackman to be an appropriate remedy notwithstanding her having obtained equivalent employment

elsewhere, nor did the Board even refer to any statement of such reasons *dehors* the record in this case.

The Circuit Court held that the requirement laid down by this Court in *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, that the Board actually exercise its discretion and state its reasons therefor, was satisfied by the fact that in an unrelated case, i. e., *In Re Ford Motor Co.*, 31 N. L. R. B. 994, 1099-1100, the Board had stated certain reasons for holding an offer of reinstatement to be an appropriate remedy in all cases. The Circuit Court ruled that

> "Until the Supreme Court determines that more is necessary, we shall assume that the reasons for requiring reinstatement are always the same as were given, once and for all, in the *Ford* case, and that they need not be stated."

Petitioner respectfully submits that the statement contained in the *Ford* case is, in effect, the setting up of a general rule or policy, and not an exercise of the discretion which this Court, in the *Phelps Dodge* case, *supra*, stated was required of the Board. Following the Board's decision in the *Ford* case, supra, it was pointed out in an article entitled "Reinstatement and Back Pay—the Phelps Dodge Case," appearing in 42 Columbia Law Review 443, 450-1, that the reasons stated by the Board in the *Ford* case were not even based upon the record or facts in that case, and that if the Board were to rest its future decisions upon the *Ford* case, it would reduce to an empty formality so much of such decisions as conform to this Court's admonition to the Board in the *Dodge* case to indicate that it has exercised its discretion.

The Board and the Court below in this case have gone even farther than anticipated or apprehended by the writer of said Law Review article, for nowhere in this case did the

Board even refer to the *Ford* case or to the allegedly invariably inapplicable reasons formulated therein. An important question of federal law is presented by the decision of the Court below, and, as was inferentially indicated in the Court's opinion (R. 287), that question should be settled by this Court.

2. *As to whether a union not shown and not claiming to represent any substantial number or proportion of employees, should be named in a notice required to be posted.*

The order directs the posting of a notice containing, among other things, a statement that petitioner's employees are free to become and remain members of Local 65, and that petitioner would not discriminate against any employee because of membership in or activity on behalf of that organization. The notice is also required to state that petitioner will not discourage membership in that named union or in any other labor organization of its employees, in the manner specified in paragraph 1(b) of the order, discussed below.

There was no claim or testimony in the record that the named union had secured membership or even support from any substantial number or proportion of petitioner's employees.

It is petitioner's contention that to require the specification of said union by name in the notice which the order requires be posted, is contrary to the policy of the Act, as it favors the named union as against any and all other unions, suggests to petitioner's employees that that union has the blessing of the Board and perhaps of the courts, and leads the employees to infer that said union was in fact or had been determined to be in fact an organization of petitioner's

employees, instead of an outside union which at best has unsuccessfully sought to become such an organization.

Petitioner submits that the foregoing presents an important question of federal law which has not been, but should be, settled by this Court.

3. *As to the requirement of Section 10(c) of the Act that the Board state its findings of fact:*

The Board in part affirmed and in part reversed the Trial Examiner, both as to findings of fact and as to conclusions (R. 253-5). It made no express findings of fact in support of its order, but merely adopted, in general language, those findings, conclusions and recommendations of the Examiner not in conflict with that portion of the decision which reversed the Examiner's findings, conclusions and recommendations as to certain matters.

The Examiner's so-called findings of fact were not specially or separately stated in the manner contemplated by Equity Rule 70½, but rather are interwoven in and form part of a general discursive statement of the evidence in the case, pro and con, in narrative form (R. 219-232), and the finding of the ultimate facts charged in the complaint (R. 231, fol. 693) is stated to be based upon "the above" (referring to the discursive statement of the evidence) and "the entire record."

This Court has had occasion, from time to time, to rule upon the form and sufficiency of findings of fact required under other Federal statutes. The question presented under Section 10(c) of the National Labor Relations Act is of considerable importance, and not free from difficulty. Varying rules have been set up under various Federal and State Statutes (See annotation in 146 A. L. R. 223), and it is submitted that the question under the Act is of sufficient importance to call for a determination by this Court.

4. *As to the effect to be given to the decision of this Court in National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426:

Paragraph 1(a) of the Board's order directs that petitioner cease and desist from discouraging Union membership by discharging or refusing to reinstate any of its employees, or in any manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment.

Presumably this paragraph rests upon the finding of discrimination in the discharge of Strackman.

Paragraph 1(b) of the order directs that petitioner cease and desist from "in any other manner" interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

Presumably paragraph 1(b) of the order is based upon the theory that a violation of Section 8(3) of the Act, which is enjoined by paragraph 1(a) of the order, is also a violation of Section 8(1) of the Act, and justifies a provision in the form of paragraph 1(b) of the order.

In the *Express Publishing Co.* case, *supra*, this Court held that a violation of the Act in one respect does not justify a blanket order against violation in any manner whatsoever, such as is contained in paragraph 1(b) of the Board's order herein; that the Board's orders, like injunction orders of a court, must state with reasonable specificity the acts an employer must do or refrain from doing; and that only acts like or related to those acts found by the Board to have been committed may be restrained by the Board's order. Specifically, this Court held that a finding of a violation of Section 8(5) by refusal to bargain collectively, and a finding of a violation of Section 8(1) by making certain statements to employees, cannot sustain an injunctive order in the form of that found in paragraph 1(b) of the order herein.

The Circuit Court of Appeals for the Second Circuit, in *National Labor Relations Board* v. *Standard Oil Co.*, 138 Fed. (2nd) 885, 888, adverting to the decision of this Court in the *Express Publishing Co.* case, *supra*, declined to follow that decision of this Court until this Court should pass upon the subject again.

This position of the Circuit Court was taken by reason of its having theretofore laid down a contrary rule in *National Labor Relations Board* v. *Air Associates*, 121 Fed. (2nd) 586, 592, and with express recognition of the fact that its decision was in conflict with that of this Court in the *Express Publishing Co.* case. Said Circuit Court has taken the same position in other cases decided by it since its decision in the *Standard Oil* case, *supra*. In other words, the Circuit Court has erected and is following a rule of *stare decisis* for its own Circuit, despite a clear contrary holding by this Court.

In view of the Circuit Court's recognition, in the *Standard Oil* case, that its rule is in conflict with the decision of this Court in the *Express Publishing Co.* case, petitioner submits that this Court should take jurisdiction for the purpose of either correcting the Court below, or otherwise settling the question presented.

5. *As to the permissible scope of an order under Section 8(3) of the Act:*

This question relates to a possible extension of the rule of the *Express Publishing Co.* case, *supra*.

Paragraph 1(b) of the order directs that petitioner cease and desist from discouraging membership in labor organizations (a) by discharging employees; (b) by refusing to reinstate employees; (c) by in any manner discriminating in regard to their hire; (d) by in any manner discriminating in regard to their tenure of employment; (e) by in any manner discriminating in regard to any term or condition of employment.

In view of the Board's reversal of its Examiner's findings as to Arthur Klein, the distribution of theatre tickets, and the giving of winter vacations, the only evidence remaining in the case that may make any claim to any degree of substantiality is the evidence with respect to Strackman's discharge. However, there is no evidence whatsoever in the record that petitioner refused reinstatement to any employee, or discriminated in regard to hire, or in regard to any term or condition of employment. In fact, the testimony of Klein was that when he applied for employment he made known to petitioner that he would join and support a union and that he was engaged notwithstanding that fact.

In view of the fact that the Board's orders in this respect, hitherto unchallenged, are usually in the form of the order herein, petitioner submits that there is presented an important question of Federal law which has been decided by the Court below in a way probably in conflict with the decision of this Court in the *Express Publishing Co.* case, *supra*, and which in any event should be settled by this Court.

6. *As to the propriety of directing the order against the employer's successors and assigns:*

The Circuit Court of Appeals for the Seventh Circuit, in *Butler Bros.* v. *National Labor Relations Board*, 134 Fed. (2nd), 981, 985, and in *Polish National Alliance* v. *National Labor Relations Board*, 136 Fed. (2nd) 175, in the absence of special circumstances, none of which appear herein (contrast *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100), has held that an order should not be directed against the employer's "successors and assigns."

The Circuit Court of Appeals for the Second Circuit, in *National Labor Relations Board* v. *Blackstone Manu-*

facturing Co., 123 Fed. (2nd) 633, 635, followed by that Court in this instant case, holds to the contrary.

This Court has held open (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, at p. 107) the question of the liability of successors and assigns in the absence of special circumstances, although it has sustained orders directed against the employer and its successors and assigns in cases where the point has not been raised by the parties (cases cited at 315 U. S. 100, at p. 106, footnote 6).

In view of the common practice of the Board to direct its orders against successors and assigns, petitioner requests that this Court grant a review herein so that the conflict between the two Circuits may be settled.

7. *The alleged discriminatory nature of the discharge of Jean Strackman;*

Petitioner submits that the questions presented under this heading (questions 7a and b, supra, p.) are of substantial importance to petitioner and other employers in view of the limited scope of review by the Courts of findings of fact by the Board.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court had in this cause, to the end that this cause may be reviewed and important questions of federal law decided by said Court, and the conflict between the decisions of the said Circuit Court of Appeals

and the Circuit Court of Appeals for the Seventh Circuit, be reviewed, settled and determined by this Court; and that the order of said Circuit Court of Appeals in this cause be reversed; and that petitioner be granted such other and further relief as may be proper.

REGAL KNITWEAR CO. INC.,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1003

REGAL KNITWEAR CO., INC.,

Petitioner.

against

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION.

The Opinion Below.

The opinion of the Court below, dated February 15, 1944, is reported in 140 Fed. (2) 746.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit, which is sought to be reviewed, was entered on March 3, 1944. Enforcement has been stayed pending application for a writ of certiorari.

This is a proceeding pursuant to Section 10(e) of the National Labor Relations Act (Act of July 5, 1935) for enforcement of an order made by the National Labor Relations Board pursuant to Section 10(c) of said Act. By said order said Board directed petitioner to reinstate in its

employ with back pay one Jean Strackman, to cease and desist from alleged violation of Sections 8(3) and 8(1) of said Act, and to post certain notices. The Circuit Court directed enforcement of the Board's order in its entirety.

The jurisdiction of this Court to review the decree of the Circuit Court is invoked under Section 10(e) of said Act and Section 240(a) of the Judicial Code.

Statement of the Case.

A summary statement of the case is set forth at pp. 2-4 of the petition.

A summary of the argument is set forth in the index to this brief.

Specification of Assigned Errors to be Urged.

It is intended to urge the following errors:

1. It was error to direct reinstatement of Jean Strackman, an employee who had secured equivalent employment elsewhere, and payment to her of back pay, without the reasons why such reinstatement would effectuate the policies of the Act being stated or referred to by the Board anywhere in the record of this case. Even if a statement of assertedly generally applicable reasons made in another case before the Board, not involving this employee or this employer, were to be held to be sufficient and not required to be restated or referred to by the Board in the record of this case, there is no substantial evidence nor any finding of fact in this case to jusify the applicability of such alleged reasons to the facts in this case.

2. It was error and contrary to the policies of the Act to require Wholesale & Warehouse Workers Union, Local 65, CIO, to be named in the notices which petitioner was directed to post.

3. It was error to direct enforcement of the order in the absence of the making and statement by the Board of findings of fact with sufficient clarity to justify its order.

4. It was error, upon the record herein, to decline to follow the rule laid down by this Court in the *Express Publishing Co.* case, and to direct petitioner to cease and desist from "in any other manner" interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and to post notices that it would not engage in such conduct.

5. It was error, upon the record herein, to direct petitioner to cease and desist from discouraging membership in labor organizations by refusing to reinstate employees, or by in any manner discriminating in regard to the hire, tenure of employment, and terms and conditions of employment of employees, and to post notices that it would not engage in such conduct.

6. It was error to direct the order against petitioner's successors and assigns.

7. It was error to sustain the finding that Jean Strackman's discharge was in violation of the Act, and to enforce those parts of the Board's order which were based thereon.

Argument.

Point I.

Reinstatement and Back Pay Should Have Been Denied on the Ground That the Record Does Not Show the Exercise by the Board of the Discretion Entrusted to It or Any Basis for the Exercise Thereof.

The decision of the Court below tends virtually to nullify the rule laid down by this Court in *Phelps Dodge Corpora-*

tion v. *National Labor Relations Board*, 313 U. S. 177, that it is incumbent upon the Board to disclose in the record that it has exercised its discretion in ordering reinstatement and back pay to an employee who has obtained equivalent employment elsewhere, and the basis upon which such discretion is claimed to have been properly exercised.

The Court below, in its opinion (R. 288), agreed with petitioner herein that (we quote from the opinion):

> "No reason appears in the Board's decision here for ordering the reinstatement of Strackman, * * *."

The Court, however, declined to reverse the Board's order for this omission, on the ground that in *In Re Ford Motor Co.*, 31 N. L. R. B. 994, 1099-1100, the Board had stated certain reasons why in its opinion reinstatement is an appropriate remedy to effectuate the policies of the Act, and had declared that those reasons do not vary from case to case. The opinion of the Court below states that inasmuch as the Board had declared in the *Ford* case that the same reasons, whether good or bad, always exist whenever an employee is discharged for union activity, it would be a barren formality to require their repetition in every case. The Court below therefore stated in its opinion that until this Court should determine that more is necessary, it would assume that the reasons for requiring reinstatement are always the same as were given in the *Ford* case and that they need not be restated in each particular case.

The Board in the *Ford* case held that there were three reasons for directing reinstatement, namely:

1. To restore the victim of discrimination to his former position;

2. "More significantly, to dissipate the deeply coercive effects upon other employees who may desire self organiza-

tion, but who have been discouraged therefrom by the threat to them implicit in the discrimination."

3. To prevent employers from eliminating union adherents from their plants by discharging such adherents and relying upon the fact that necessity almost inevitably compels a discharged employee to seek the best available other employment, and the probability that such search would be successful.

It must be the sense of the decision of this Court in the *Phelps Dodge* case, *supra*, that where a discharged employee has secured equivalent employment, the first reason, namely, to restore him to his former position, is not sufficiently directed towards effectuation of the policies of the Act to be determinative.

As to the second reason, petitioner respectfully submits that the applicability thereof to a particular case must necessarily depend upon substantial evidence and a finding in the particular case that a coercive effect upon other employees was actually accomplished, or at least that other employees knew of the discharge and the reasons therefor. These circumstances necessarily must vary from case to case. Nowhere in this case is there any evidence of any kind that other employees were coerced by, or even knew of, Miss Strackman's discharge or the alleged reasons therefor. The second reason stated by the Board in the *Ford* case therefore cannot be relied upon to sustain the Board's order in this case.

It is submitted that the third reason advanced by the Board in the *Ford* case is similarly inapplicable to this case and cannot sustain the reinstatement order, for the following reasons:

(a) We submit that the nullification or prevention of the elimination of union adherents from a plant, by recall-

ing such union adherents from other equivalent employment and reinstating them in their former positions, is not necessarily related to the effectuation of the policies of the Act. The objective of the Act is to prevent obstructions in interstate commerce by reason of industrial unrest (Section 1 of the Act), and to promote the peaceful settlement of disputes by providing legal remedies for the invasion of employees' rights of self organization and collective bargaining by restraint or coercion (*National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240). The unfair labor practices interdicted by Section 8 of the Act are prohibited because they provoke or tend to provoke industrial unrest affecting interstate commerce. (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.) We believe that it would be carrying the Act beyond the constitutional powers of Congress to hold that the policy of the Act is to foster collective bargaining for its own sake, unrelated to any considerations having to do with the prevention of industrial unrest. Accordingly, it is submitted that the third reason advanced by the Board is not valid in any case.

(b) Even if it were held that the third reason advanced by the Board is a valid one and does relate to the effectuation of the policies of the Act, nevertheless that reason would be inapplicable upon the record of this case. The effect of denying reinstatement which is postulated by the Board, namely, that employers could then eliminate union adherents from their plants, does not exist upon the record in this case. There remains in the record only one alleged discharge for union membership or activity, namely, the discharge of Strackman, who, by her own admission (R. 10, 26, 37, 48), was not active in the union. It cannot be said that by the discharge of Strackman alone petitioner herein

has made any substantial move in the direction of eliminating union adherents from its plant.

(c) In addition to the foregoing considerations, attention is directed to the fact that in formulating the statement of reasons in the *Ford* case, the Board did not discuss the particular circumstances of that case, but merely engaged in a general discussion of why, as a general proposition, the securing of equivalent employment should not prevent it from directing reinstatement. As was pointed out by Milton H. Feinberg, Esq., in his article entitled "Reinstatement and Back Pay—The Phelps Dodge Case" (1942) 42 Columbia Law Review 443, 450-1:

> "Whether or not it (the reasoning of the Board in the *Ford* case) complies with the ruling the Supreme Court in the *Phelps Dodge* case is another matter. It may be questioned that formulation of reasons for ordering the reinstatement of equivalently employed workers which 'do not vary from case to case' constitutes compliance with Justice Frankfurter's demand that 'the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.' In effect, the Board is setting up a general rule, consistent compliance with which will reduce to an empty formality so much of its future decisions as shall conform to the Court's admonition to indicate the exercise of discretion."

Petitioner therefore respectfully submits that both the Board in the *Ford* case and the Court below in this case were in error in assuming that the decisive considerations upon the question of reinstatement of discharged employees who have obtained equivalent employment elsewhere do not vary from case to case, and that the statement of reasons or general policy made by the Board in the *Ford* case should not be permitted virtually to nullify the principle laid down by this Court in the *Phelps Dodge* case.

Point II.

It Was Contrary to the Policies of the Act to Require Wholesale & Warehouse Workers Union, Local 65, CIO, to Be Named in the Notices Which Petitioner Was Directed to Post.

Paragraph 1 (a) of the order directs petitioner, its officers, agents, successors and assigns, "to cease and desist from discouraging membership in the Wholesale and Warehouse Workers Union, Local 65, affiliated with the Congress of Industrial Organizations, or in any other labor organizations of its employees * * *."

Paragraph 2(c) (1) of the order directs the posting of notices to the effect that the petitioner will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1(a) and 1(b) of the order.

Paragraph 2(c) (3) directs that the notices state that petitioner's employees are free to become and remain members of the Wholesale and Warehouse Workers Union, Local 65, affiliated with the Congress of Industrial Organizations, and that petitioner will not discriminate against any employee because of membership in, or activity on behalf of, that organization.

It will be noted therefore that a particular union is mentioned by name in paragraphs 1(a), 2(c) (1) (by reference to paragraph 1(a)), and 2(c) (3) of the order.

Paragraph 1(a) complies at least with the ruling in *Polish National Alliance* v. *National Labor Relations Board*, 136 Fed. (2) 175, by the inclusion of the words 'or in any other labor organization of its employees.' Paragraph 2(c) (3), however, limits itself solely to the named union, without the inclusion of the words 'or in any other labor organization of its employees'.

Had petitioner of its own volition posted a notice stating that it would not discourage membership in the Wholesale and Warehouse Workers Union, Local 65, CIO, or in any other labor organization of its employees, and that its employees are free to become and remain members of said named union, it would have left itself open to the charge:

> 1. That it was seeking to encourage membership in the named union; and
>
> 2. That it was foisting upon its employees the statement that the named union was a labor organization of its employees;

and it is conceivable that some rival union could have successfully initiated and prosecuted a proceeding against petitioner under Section 10 of the Act.

There is neither evidence nor finding of fact in this record that the named union had a majority or even any substantial number or proportion of petitioner's employees as its members or adherents. There is neither evidence nor finding that any appreciable number or proportion of petitioner's employees had been discouraged from membership, or at least hesitated at membership, because of petitioner's alleged attitude towards the union herein, or even that any substantial number of employees had any knowledge of such alleged attitude. Petitioner respectfully submits that under such circumstances it is directly contrary to the policies of the Act to require petitioner to post notices naming the union herein and describing it, either directly or by inference, as a labor organization of its employees. The Board should be held to have no wider license than the employer to discriminate in favor of any particular union, whether directly by its own action, or indirectly by compelling action on the part of the employer.

Point III.

The Case Should Have Been Remanded for the Making of Clear Findings of Fact.

Two questions are involved under this point:

1. Whether the form of the so-called findings of fact used by the Board in this and many other cases is a compliance with the requirement of Section 10(c) of the Act;

2. Whether, assuming that in the ordinary case the form of the findings of fact would have been sufficient, that form is nevertheless insufficient in this case because the Board failed to indicate the basis of its order with sufficient clarity, because it made no express findings of fact in support of its order, but merely stated that it adopted those findings, conclusions, and recommendations of the Examiner not in conflict with that portion of the decision which reversed the Examiner's findings, conclusions, and recommendations as to certain matters.

In *National Labor Relations Board* v. *Thompson Products, Inc.* (Sixth Circuit, 1938) 97 Fed. (2) 13, the Court, after pointing out that the respondent in that case had not attacked the form of the Board's findings, stated.

> "The finding of facts of the Board is not in the proper form. It has mingled therein statements of witnesses and expressions of opinion. No reference should be made to the evidence nor any discussion injected into the ultimate finding of facts upon which the Board rests its order. There should be a clean-cut statement of the ultimate facts without incorporating therein the evidence or the reasoning by which the Board arrived at its finding. If the Board desires to discuss or emphasize any part of the evidence or give its reasons for

its findings, it should do so in the form of an opinion or memorandum which should not be incorporated into, or connected with, the special finding of facts."

Cf. *National Relations Board* v. *Remington Rand, Inc.*, (Second Circuit) 94 Fed. (2) 862, 865.

This Court, in *United States v. Baltimore & Ohio Railroad*, 293 U. S. 454, 464, a suit to set aside an order of the Interstate Commerce Commission, stated:

> "It is true that formal and precise findings are not required, under Section 14 (1) of the Interstate Commerce Commission Act, which declares that the report 'shall state the conclusions of the Commission together with its decision' * * * That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½."

Section 14 (1) of the Interstate Commerce Act, thus cited and construed by this Court, differs both from Section 10 (c) of the National Labor Relations Act and from Section 14 (1) of the original Interstate Commerce Commission Act prior to such amendment. Section 14 (1) of the original Interstate Commerce Commission Act before its amendment required that the Commission's report should "include findings of fact upon which the conclusions of the Commission are based", thereby being similar to the language of Section 10 (c) of the National Labor Relations Act, which requires that the Board "shall state its findings of fact." We submit, under the first question stated in this point, that the change effected by the amendment to the Interstate Commerce Commission Act, and the construction placed upon the new language by this Court in the *Baltimore & Ohio* case, *supra*, indicates that the former language of the Interstate Commerce Commission

Act, and the similar language in Section 10 (c) of the National Labor Relations Act, should be construed as requiring more formal or at least more specific statements of fact than are found in the instant case.

As to the second question raised under this point:

The Examiner's so-called findings of fact, referred to and adopted in part by the Board, are not specially or separately stated, but rather are interwoven in and form part of a general discursive statement of the evidence in the case, pro and con, in narrative form (R. 219-232). His findings of the ultimate facts charged in the complaint (R. 231, fol. 693) are stated to be based upon "the above" (referring to the discursive statement of the evidence) and upon "the entire record."

Petitioner submits that an examination of the entire record, and a mental elimination therefrom of that evidence which is not substantial (e. g., the evidence of the witness Piccolo, set forth at pp. 170-173 of the record which seems clearly unsubstantiated, although deemed otherwise by the Examiner (R. 230-231)), and also of the evidence in support of the findings of the Examiner which were expressly reversed by the Board (R. 253-255), leaves it in doubt as to precisely what formed the basis of the order herein, other than testimony as to the alleged discharge of Strackman. We submit that under such circumstances the case should at least have been remanded to the Board for the making of clear findings of the facts upon which it rests its ultimate decision. *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454; *Great Northern Railway Co.* v. *Department of Public Works*, 161 Washington 29.

Point IV.

The Court Should Have Declined to Enforce That Part of the Board's Order Which Requires Petitioner to Cease and Desist from "in Any Manner" Interfering with, Restraining, or Coercing Its Employees in the Exercise of the Rights Guaranteed by Section 7 of the Act.

This point presents the anomalous situation of a direct refusal by the Circuit Court to overrule its own line of decisions which it expressly recognizes are in conflict with the decisions of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426.

The opinion of the Court below expressly relies upon the prior decision of that Court in *National Labor Relations Board* v. *Standard Oil Co.*, 138 Fed. (2) 885, 888. The question presented is outlined in some detail at pp. — of the petition herein, and in view of the nature of the question it is believed that it need not be briefed at this stage of the proceedings before this Court.

Point V.

The Court Should Have Declined to Enforce That Part of the Order Which Directs That Petitioner Cease and Desist from Discouraging Membership in Labor Organizations by Refusing to Reinstate Employees, by Discriminating in Regard to Their Hire, and by Discriminating in Regard to Any Term or Condition of Employment.

This question likewise arises under this Court's decision in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, referred to in Point IV, *supra*.

The question presented is whether those portions of the cease and desist order which are referred to in the heading

of this point, may properly be included in the order, where (a) there has been no showing of any discrimination or likelihood of discrimination by refusal to reinstate, or of discrimination in regard to the hiring of employees or in regard to terms or conditions of employment, (b) the only evidence left in the case after the partial reversal of the Trial Examiner by the Board is evidence with respect to the discharge of a single employee, and (c) there is no evidence or finding as to discrimination or likelihood of discrimination in the respects mentioned in the heading of this point.

The question is outlined at pp. — of the petition herein, and, in the interest of brevity, will not be further briefed at this stage of the proceedings in this Court.

POINT VI.

The Order Should Not Have Been Directed Against Petitioner's Successors or Assigns.

As stated at pp. 12-13 of the petition, there is a direct conflict between the Seventh Circuit and the Second Circuit as to the propriety of directing an order against the employer's successors or assigns.

The Circuit Court of Appeals for the Second Circuit has held in *National Labor Relations Board* v. *Blackstone Manufacturing Co.*, 123 Fed. (2) 633, 635, cited by the Court below as authority in this case, that the order may properly be so directed, but in the same case stated that the addition of these words adds nothing to the order.

This Court in *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, at pp. 106-7, took a diametrically opposed position. It stated:

> "The additional evidence (that since the making of the order the employer had dissolved and transferred its assets) was immaterial for the further reason that

the Board's order ran not only to the petitioner, but also to its 'officers, agents, successors and assigns.' Granting the truth of every one of petitioner's allegations, it still is possible that the Board's order may yet be the basis—and the indispensable basis—of liability on the part of any of these persons, regardless of any present incapacity of petitioner to perform, or liability on its part for failure to perform, its duty of reinstatement. Of course, we do not pass on the question whether any such liability actually exists; all we hold is that there has not been a sufficient showing by the petitioner to negative the possibility which we note."

We submit that the fact that this Court, in the absence of objection, has often sustained orders directed against the employer's successors or assigns, is of no bearing upon the question now presented, inasmuch as the point has been directly raised by the petitioner both in the Court below and in this Court, as well as before the Board.

Petitioner submits that the question is of far-reaching importance and should be authoritatively determined by this Court, so that it may be known whether or not the Board, by directing its order against successors or assigns of an employer, may in effect impose a continuing servitude upon the assets of the employer in the hands not only of the employer but also of its transferees in good faith.

Point VII.

There Was no Substantial Evidence That the Discharge of Jean Strackman Was in Violation of the Act.

The Court below, in its opinion, declined to pass upon the question as to whether evidence of discrimination may be so confused and contradictory as not to constitute substantial evidence sufficient to sustain a finding. The decision of that question was avoided by the finding of the Court that Strackman's testimony was no more confused and self-

contradictory than that of many honest witnesses whose evidence is accepted as sufficient to sustain the verdict.

Petitioner recognizes that it is for the Board, and not for the Court, to pass upon the credibility of witnesses and to draw inferences from the testimony. Those inferences, however, must be reasonable. It is petitioner's contention that Strackman's testimony was subject to more than ordinary self-contradiction, in that the points upon which Strackman contradicted herself indicated beyond doubt that respondent's witness' version of the facts was true, and Strackman's version false. As was stated by the Court in *National Labor Relations Board* v. *Sun Shipbuilding and Drydock Co.*, 135 Fed. (2) 15, 25, the evidence which the Board accredits must be such as a reasonable mind may accept as adequate to support a conclusion. Petitioner believes that neither the Board, nor its Examiner, nor the Court below, saw fit to analyze Strackman's testimony to discover its inherent weakness and its utter lack of any substantial weight. In the interest of brevity, the making of such an analysis will be reserved for such further proceedings as may be taken before this Court in the event that the writ be allowed.

Conclusion.

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

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APPENDIX.

NATIONAL LABOR RELATIONS ACT (49 STAT. 452)

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 10(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.